IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 13, 2007

STATE OF TENNESSEE v. MARIO C. GRAY a/k/a/ RICKY FLETCHER

Appeal from the Criminal Court for Davidson County
No. 2005-B-1097 Monte Watkins, Judge

No. M2006-00398-CCA-R3-CD - Filed December 17, 2007

In 2004, Appellant, Mario C. Gray, was initially indicted for aggravated robbery. Appellant was later reindicted for aggravated robbery and attempted first degree murder. After a jury trial, he was convicted of aggravated robbery and felony reckless endangerment. As a result, the trial court sentenced the appellant to ten years for aggravated robbery and two years for reckless endangerment. The trial court ordered the sentences to run consecutively. After the denial of a motion for new trial, Appellant sought resolution of the following issues on appeal: (1) whether the evidence was sufficient to support the convictions for aggravated robbery and reckless endangerment; (2) whether the convictions for aggravated robbery and reckless endangerment violate double jeopardy; (3) whether the trial court erred by refusing to allow the appellant to impeach the victim with evidence of prior bad acts; (4) whether the trial court erred in instructing the jury that felony reckless endangerment was a lesser included offense of attempted first degree murder; and (5) whether the trial court properly sentenced the appellant. We conclude that the trial court erred by failing to allow Appellant to impeach the victim's testimony with proof of prior bad acts but deem the errors harmless. Further, even though the trial court improperly applied enhancement factors to Appellant's sentence, we conclude that the trial court properly sentenced Appellant. Additionally, we conclude that: (1) the evidence was sufficient to support the convictions. However, because we determine that felony reckless endangerment is not a lesser included offense of attempted first degree murder and Appellant's failure to object did not constitute consent to amend the indictment to add reckless endangerment, we vacate Appellant's conviction for reckless endangerment and remand the case to the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgements of the Criminal Court are Affirmed in Part; Reversed and Vacated in Part and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES, and J. C. MCLIN, JJ., joined.

Jeffrey A. DeVasher, (on appeal), Willow Fort and Virginia Flack, (at trial), Assistant Public Defenders, for appellant Mario C. Gray.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Deborah Housel, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On March 1, 2003, Adrian Hardin, the victim, was at the apartment of his girlfriend, Tameka Buckley. The apartment was located at 2526 Twenty-Sixth Avenue North in the "Dodge City" area of Nashville. The two had recently rekindled their on-again, off-again relationship and spent the evening hanging out at the apartment and going to the grocery store. At around one a.m., the pair were putting groceries away in Ms. Buckley's apartment when Appellant knocked on the door and tried to open it. Ms. Buckley answered the door and motioned to Appellant that there was someone in the apartment. Appellant left. At that time, the victim felt uncomfortable and decided to go to a restaurant.

The victim and Ms. Buckley walked out of the apartment to the parking lot and got inside the victim's car. The victim started his car to warm it up when a black SUV pulled up, and Appellant and two other men jumped out. According to the victim, Appellant knocked on the passenger side window of the victim's car and asked Ms. Buckley if she wanted to buy a cell phone. Ms. Buckley said "no," and Appellant got back into the black SUV. At that time, Ms. Buckley exited the victim's car and started walking back to her apartment.

The black SUV pulled back up to the victim's car after Ms. Buckley left, and Appellant again exited the vehicle. Appellant opened the passenger door, asked the victim if he wanted to buy a cell phone and pulled out a gun and pointed it at the victim's side. Another man got out of the black SUV and got into the backseat of the victim's car. This man held a gun to the victim's head. Appellant told the victim not to move or that he would shoot him. The victim described the guns as a .38 snub-nosed revolver and a .44 or .45 chrome revolver. While the victim was being held at gunpoint, Appellant went through the victim's pockets, taking his wallet, which contained forty dollars. The men also took some compact discs from the victim's car.

Ms. Buckley's brother, Terrance Buckley, drove up while the robbery was in progress. Mr. Buckley parked his van next to the victim's car and got out. At that time, the victim heard the perpetrator in the back seat pull the trigger on the gun, and the victim heard it making a clicking noise. The victim thought that he was dead. Mr. Buckley ran up to the car and asked the men what they were doing to the victim. Mr. Buckley, who had been friends with Appellant for quite some time, informed the men that the victim had just bought groceries for his sister and that they should leave him alone. Mr. Buckley saw one man "playing with a gun" that was pointed at the victim's head but did not see Appellant with a gun. At that time, Appellant told the victim to, "Get

somewhere." The victim complied, driving away from the scene. The victim found Officer Terrance Demarest of the Metro Nashville Police Department nearby on the corner of D.B. Todd and Buchanan. The victim informed Officer Demarest of the robbery. At the time, the victim was visibly upset and emotionally distraught.

Ms. Buckley saw some of the events from her apartment. After she left the victim's car and returned to her apartment, she looked out the door and saw that both of the back doors on the victim's car were open. At first she thought that the victim was looking for something in the car, but when she started down the stairs to get a closer look, she saw that the victim had two guns pointed at his head. Appellant held one gun and a man named "Little Bubba" held the other gun. At that point, she started crying and asked her brother to intervene.

Later that day, the victim contacted Ms. Buckley in order to find out Appellant's name. At first, Ms. Buckley refused to tell the victim. Eventually, she told the victim that Appellant's nickname was "M.O." and that his name was Mario Gray.

Sometime later, the victim contacted the police and gave them Appellant's name. Detective Leonard Peck was assigned to investigate the case. Detective Peck prepared a photographic lineup after being contacted by the victim. The victim was able to identify Appellant's photograph from a lineup.[1]

On July 30, 2004, Appellant was indicted by the Davidson County Grand Jury for aggravated robbery. On May 20, 2005, a superseding indictment was filed that charged Appellant with aggravated robbery and attempted first degree murder. Appellant sought to dismiss the superseding indictment, but the trial court denied the motion.

At trial, both the victim and Ms. Buckley were able to positively identify Appellant as the perpetrator. At the conclusion of the jury trial, Appellant was convicted of aggravated robbery and felony reckless endangerment as a lesser included offense of attempted first degree murder.

Following a sentencing hearing, the trial court sentenced Appellant to ten years for aggravated robbery and two years for reckless endangerment. The trial court ordered the sentences to run consecutively, for a total effective sentence of twelve years. The trial court denied Appellant's timely motion for new trial. On appeal, Appellant argues that: (1) the evidence was insufficient to support the convictions for aggravated robbery and reckless endangerment; (2) the convictions for aggravated robbery and reckless endangerment violate double jeopardy; (3) the trial court improperly refused to allow Appellant to impeach the victim's testimony with evidence of a prior misdemeanor conviction for attempt to alter a license tag and a dismissed shoplifting charge; (4) the trial court improperly instructed the jury on the lesser included offenses of attempted first degree murder; and (5) the trial court improperly sentenced Appellant.

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[1] Appellant was identified in the photograph as "Ricky Lamont Fletcher," apparently an alias used by Appellant.

Analysis

Sufficiency of the Evidence

First, Appellant claims that the evidence was insufficient to sustain his convictions for aggravated robbery and reckless endangerment. Specifically, Appellant argues that the convictions rest "entirely on the testimony of the alleged victim" and that the victim "fabricated the charges against [Appellant]." Further, Appellant argues that the evidence does not establish his criminal responsibility for the conduct of another such that he could be found guilty of reckless endangerment. The State disagrees, arguing that the evidence established that Appellant committed both aggravated robbery and reckless endangerment.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts" in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

Appellant was convicted of aggravated robbery. Pursuant to T.C.A. § 39-13-401, robbery is defined as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Aggravated robbery is robbery that is "accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." T.C.A. § 39-13-402.

Under Tennessee's reckless endangerment statute, "[a] person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury." T.C.A. § 39-13-103(a). When reckless endangerment is committed with a deadly weapon, it is a Class E felony. T.C.A. § 39-13-103(b). A person acts recklessly

"when the person is aware of but consciously disregards a substantial and unjustifiable risk." T.C.A. § 39-11-302(c). That "risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint." *Id.*

> "A person is criminally responsible for an offense committed by the conduct of another if . . . [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense . . . ."

T.C.A. § 39-11-402(2). In *State v. Maxey*, 898 S.W.2d 756 (Tenn. Crim. App. 1994), this Court ruled that "[i]t is necessary that the defendant 'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'" 898 S.W.2d at 757 (quoting *Hembree v. State*, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)). This Court also concluded that "[t]he defendant must 'knowingly, voluntarily and with common intent unite with the principal offenders in the commission of the crime.'" *Id.* (quoting *State v. Foster*, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988)). Even under the theory of criminal responsibility for the acts of another, mere presence during the commission of the crime is not enough to convict. *See Flippen v. State*, 365 S.W.2d 895, 899 (Tenn. 1963); *Anglin v. State*, 553 S.W.2d 616, 619 (Tenn. Crim. App. 1977). However, presence and companionship with the perpetrator of a felony before and after the commission of the offense are circumstances from which one's participation in the crime may be inferred. *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). No particular act need be shown. It is not necessary for one to take a physical part in the crime; mere encouragement of the principal is sufficient. *State v. McBee*, 644 S.W.2d 425, 428 (Tenn. Crim. App. 1982).

Viewing the evidence in a light most favorable to the State, the proof established that Appellant and another individual entered the victim's car on March 1, 2003, and pointed guns at the victim's head while robbing him of his wallet, which contained approximately forty dollars. Appellant arrived and departed from the scene with the man who pointed his gun at the victim's head from the back seat of the victim's car and ultimately pulled the trigger of the gun, placing the victim in fear for his life. From the evidence, the jury could infer that the intent of Appellant and his companion were the same - to rob the victim while holding him at gunpoint and then shoot the victim. Both Appellant and his companion benefitted in the proceeds of the robbery when they took the victim's forty dollars. Thus, the evidence amply supports the jury's determination that Appellant committed both aggravated robbery and reckless endangerment. This issue is without merit.

Double Jeopardy

Next, Appellant argues that his dual convictions for aggravated robbery and reckless endangerment violate the double jeopardy clauses of the United States and Tennessee Constitutions. Specifically, Appellant contends that he received separate convictions for a single

act and single offense. The State counters that Appellant waived the issue for failure to include it in the motion for new trial and, in the alternative, that the convictions do not violate double jeopardy.

The State correctly points out that this issue has not been raised by Appellant prior to this appeal. When an issue is raised for the first time on appeal, it is typically waived. *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Rule 3(e) of the Tennessee Rules of Appellate Procedure provides:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action *upon which a new trial is sought*, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.

Tenn. R. App. P. 3(e) (emphasis added); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial). A panel of this Court has previously held that pursuant to Rule 3(e) "the failure to file a motion for a new trial, the late filing of a motion for a new trial, and the failure to include an issue in a motion for a new trial results in waiver of all issues which, if found to be meritorious, would result in the granting of a new trial." *State v. Keel*, 882 S.W.2d 410, 416 (Tenn. Crim. App. 1994) (footnote omitted).

However, Appellant herein is not asking for a new trial, and a dismissal of the convictions based on double jeopardy grounds would not result in a new trial, it would result in a dismissal of the prosecution. The waiver provisions of Rule 3(e) do not apply if the issue that a defendant failed to raise in a motion for new trial is found to be meritorious and would result in the dismissal of the prosecution against the accused. *Keel*, 882 S.W.2d at 416, n.5 (citing *State v. Davis*, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987); *State v. Durham*, 614 S.W.2d 815, 816 n.1 (Tenn. Crim. App. 1981)). In the case herein, if Appellant is correct in his assertion that his convictions for both aggravated robbery and reckless endangerment violate double jeopardy he would be entitled to dismissal of the prosecution for one of the offenses. Therefore, we are permitted to address this issue despite Appellant's failure to include it in his motion for new trial. *See id.* Consequently, we will address this issue on the merits.

The prohibition against double jeopardy embodied in the Fifth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The prohibition against double jeopardy is designed to protect criminal defendants from being "subject for the same offense to be twice put in jeopardy of life or limb." *Id.*

To determine whether multiple convictions arising out of a single criminal episode are permitted, this Court must: (1) conduct an analysis of the statutory offenses pursuant to

Blockburger v. United States, 284 U.S. 299 (1932); (2) analyze the evidence used to prove the offenses; (3) consider whether there were multiple victims or discrete acts; and (4) compare the purposes of the respective statutes. *State v. Denton*, 938 S.W.2d 373, 381 (Tenn. 1996).

We begin with the *Blockburger* inquiry, to determine whether the offenses at issue constitute the "same offense" under the double jeopardy clause. Multiple convictions do not violate double jeopardy if "[t]he statutory elements of the two offenses are different, and neither offense is included in the other." *State v. Black*, 524 S.W.2d 913, 920 (Tenn. 1975) (citing *Iannelli v. United States*, 420 U.S. 770 (1975)). Specifically, we must examine the offenses to "ascertain 'whether each [statutory] provision requires proof of a fact which the other does not.'" *Iannelli*, 420 U.S. at 786 n.17 (quoting *Blockburger*, 284 U.S. at 304).

Class E felony reckless endangerment is "recklessly engag[ing] in conduct which places or may place another person in imminent danger of death or serious bodily injury . . . committed with a deadly weapon." T.C.A. § 39-13-103. Aggravated robbery is committed by an individual who intentionally or knowingly commits "theft of property from the person of another by violence or putting the person in fear" by using "a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." T.C.A. §§ 39-13-401(a), -402(a)(1). While both crimes require the use of a deadly weapon, it is clear from examining the statutes that the two offenses have different statutory elements. Aggravated robbery, by its very terms, requires a theft while felony reckless endangerment does not.

Further, Appellant's aggravated robbery conviction stemmed from his act of taking the victim's wallet. The reckless endangerment conviction, on the other hand, arose from Appellant's criminal responsibility for the actions of the perpetrator in the back seat, who held the gun to the victim's head and pulled the trigger. Thus, the evidence underlying each conviction, while part of the same overall transaction, is indeed distinct. "If the same evidence is not required, then the fact both charges relate to, and grow out of, one transaction, does not make a single offense where two are defined by the statutes." *State v. Denton*, 938 S.W.2d 373, 380 (Tenn. 1996). While there was only one victim involved, the two crimes are comprised of discrete acts. As noted, the aggravated robbery required Appellant to physically take something away from the victim, in this case a wallet. The reckless endangerment, however, was accomplished when the second individual pulled the trigger on the gun that was pointed at the victim's head. Additionally, the statutes prohibiting Appellant's conduct serve different purposes. The aggravated robbery statute obviously exists to prohibit a person from forcibly taking property away from another by using a deadly weapon or causing serious bodily injury. The reckless endangerment statute, on the other hand, seeks to punish individuals for placing the life of another in imminent danger of death or serious bodily injury. Consequently, we determine that Appellant's convictions for aggravated robbery and reckless endangerment do not violate double jeopardy. This issue is without merit.

Impeachment of the Victim

Next, Appellant argues that the trial court abused its discretion by not allowing him to impeach the victim's testimony with evidence of a misdemeanor conviction for attempting to alter a license tag and a dismissed charge for shoplifting. Specifically, he argues: (1) that the prior conviction was admissible under Tennessee Rule of Evidence 609; (2) that the evidence of the dismissed charge was admissible under Tennessee Rule of Evidence 608; and (3) that both prior bad acts were directly relevant to the victim's credibility as a witness. The State counters that the trial court acted within its discretion when excluding the misdemeanor conviction and that, while improper, the trial court's exclusion of the prior instance of theft was harmless error.

Tennessee Rule of Evidence 608(b) allows a party to ask a witness about specific instances of conduct that are probative of the witness's untruthfulness in order to attack the credibility of the witness. The trial court must first determine that the alleged conduct has probative value and that there is a reasonable factual basis for the inquiry. *See* Tenn. R. Evid. 608(b)(1). If the conduct occurred more than ten years prior to the present prosecution, the party seeking to impeach must provide sufficient advance notice to the adverse party. The trial court must also determine that "the probative value of the evidence, supported by specific facts and circumstances, *substantially* outweighs its prejudicial effect." Tenn. R. Evid. 608(b)(2) (emphasis added). The trial court's ruling will only be disturbed upon a finding of an abuse of discretion. *See State v. Roberts*, 943 S.W.2d 403, 408 (Tenn. Crim. App. 1996), *overruled on other grounds by State v. Ralph*, 6 S.W.3d 251, 257 (Tenn. 1999).

Further, under Rule 609 of the Tennessee Rules of Evidence, a witness's credibility may be impeached by prior convictions if certain criteria are met. Among the criteria is that the crime must be punishable by death or at least a one year imprisonment or involve dishonesty or false statement. Tenn. R. Evid. 609(a)(2). The courts of this State have repeatedly held that robbery and theft are crimes of dishonesty, "thus lending greater weight to their probative value regarding credibility." *State v. Lamario Sumner*, No. W2005-00122-CCA R3-CD, 2006 WL 44377, at *5 (Tenn. Crim. App., at Jackson, Jan. 6, 2006), *perm. app. denied*, (Tenn. May 30, 2006) (quoting *State v. Blevins*, 968 S.W.2d 888, 893 (Tenn. Crim. App. 1997)). In addition, the conviction must not have occurred more than ten years before the current proceedings, and if it is more than ten years, there must be sufficient notice from the defense for it to be used. Tenn. R. Evid. 609(b). A trial court's decision under this rule will not be overturned absent an abuse of discretion. *State v. Mixon*, 983 S.W.2d 661, 675 (Tenn. 1999).

In determining whether the probative value of a prior conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues, a trial court should first analyze whether the impeaching conviction is relevant to the issue of credibility. *See State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003). Moreover, "[i]mpeachment cannot be a 'mere ruse' to present to the jury prejudicial or improper testimony." *State v. Jones*, 15 S.W.3d 880, 892 (Tenn. Crim. App. 1999) (quoting *State v. Roy L. Payne*, No. 3C01-9202-CR-45, 1993 WL 20116, at *2 (Tenn. Crim. App., at Knoxville, Feb. 2, 1993)).

In the case herein, the record reflects that Appellant sought to introduce evidence of the victim's prior misdemeanor conviction for attempt to alter a license tag as well as a dismissed charge of theft under Tennessee Rules of Evidence 608 and 609. The trial court refused to allow Appellant to impeach the victim's testimony with the evidence of the attempt to alter a license tag because Appellant was not able to produce legal authority to support the proposition that the conviction was a crime of dishonesty. In fact, counsel for Appellant conceded that she had no authority to support that proposition. Without authority to support that the crime of attempting to alter the license tag was one of dishonesty, the State argues that this Court cannot conclude that the trial court abused its discretion by "appl[ying] an incorrect legal standard, or reach[ing] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)).

The crime of altering a license tag appears in Title 55 of the T.C.A. which is entitled "Motor and Other Vehicles." The crime itself is enumerated in T.C.A. § 55-5-116, which is in Chapter 5, entitled "Anti-Theft Provisions." Specifically, T.C.A. § 55-5-116(1) makes it a crime to "alter with *fraudulent* intent any certificate of title, certificate of registration, registration plate, or permit . . . " (emphasis added). A violation of T.C.A. § 55-5-116 is a class E felony. While it is true that T.C.A. § 1-3-109 provides that the headings to statutes are not part of the statutes themselves, it is perfectly permissible under widely accepted principles of statutory construction to look to these headings in the quest to determine legislative intent. *See*, 2A Norman J. Singer, *Sutherland's Statutory Construction*, § 47:14 (6th ed. 2000). We determine that the crime, by its very nature, is a crime of dishonesty. This conclusion is supported by the statute's location in the "Anti-Theft" provisions of Title 55 of the T.C.A. The crime also requires fraudulent intent. Further, a panel of this Court has already determined that a conviction for "an attempt to alter a license tag" was admissible as a prior bad act under Rule 609 as a "crime of dishonesty because the perpetrator of such a crime intends to mislead others." *State v. Gregory N. Boykin*, No. M2006-01777-CCA-R3-CD, 2007 WL 1828880, at *7 (Tenn. Crim. App., at Nashville, June 26, 2007). Therefore, it appears that the trial court erred by refusing to allow Appellant to cross-examine the witness with respect to this conviction.

Additionally, with respect to the victim's dismissed charge for theft, we determine that the trial court erred by refusing to allow Appellant to cross-examine the victim. Because the charge was dismissed after the victim attended "shoplifting school," the trial court refused to allow Appellant to cross-examine the victim with evidence that he had given himself unauthorized discounts while he was employed by Kroger. A prior instance of conduct amounting to a theft would be admissible on the question of an individual's credibility under Tennessee Rule of Evidence 608(b) even if no conviction resulted from the conduct.

While we acknowledge the trial court made two errors with respect to the admissibility of the witness's prior convictions, we determine that the errors were harmless. Contrary to Appellant's claims, the evidence of Appellant's guilt did not rest solely on the credibility of the victim's testimony. There were two other witnesses, besides the victim, that placed Appellant in the car with the victim at the time of the robbery. Both Tameka Buckley, the victim's girlfriend, and Terrance Buckley, Ms. Buckley's brother, testified that they saw Appellant in the car with the victim at the time of the

robbery. Ms. Buckley saw Appellant holding a gun pointed at the victim's head. Although Mr. Buckley denied seeing Appellant with a gun, he acknowledged that he saw Appellant's companion pointing a gun at the victim's head. As a result of the volume of additional evidence of Appellant's guilt, we determine that the trial court's determination to refuse to allow Appellant to cross-examine the victim about his prior bad acts was harmless. We conclude that this error more probably than not did not affect the outcome of the trial on the merits. Consequently, Appellant is not entitled to relief on this issue.

Lesser Included Offense Instruction

Appellant next argues that the trial court erred by instructing the jury on felony reckless endangerment as a lesser included offense of attempted first degree murder. Specifically, Appellant contends that "Tennessee law is clear that felony reckless endangerment is not a lesser included offense of attempted first degree murder." Thus, he contends that this Court should reverse and dismiss his conviction and remand for a new trial on the lesser included offense of misdemeanor reckless endangerment. The State counters that Appellant waived the issue by failing to object to the instruction at trial.

A trial court has a duty to give a complete charge of the law applicable to the facts of the case. *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. 1992). Anything short of a complete charge denies a defendant his constitutional right to trial by a jury. *State v. McAfee*, 737 S.W.2d 304, 308 (Tenn. Crim. App. 1987). However, Tennessee law does not mandate that any particular jury instructions be given so long as the trial court gives a complete charge on the applicable law. *State v. West*, 844 S.W.2d 144, 151 (Tenn. 1992). A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997). Erroneous jury instructions require a reversal, unless the error is harmless beyond a reasonable doubt. *See Welch v. State*, 836 S.W.2d 586 (Tenn. Crim. App. 1992).

We agree with Appellant and the State that felony reckless endangerment is not a lesser included offense of attempted first degree murder. In *State v. Rush*, 50 S.W.3d 424, 431 (Tenn. 2001), the Tennessee Supreme Court, applying the test set forth in *State v. Burns*, 6 S.W.3d 453 (Tenn. 1999), determined that felony reckless endangerment is not a lesser included offense of attempted second degree murder. The court noted that felony reckless endangerment requires proof of an element, namely the use of a deadly weapon, that is not required for an attempted second degree murder conviction and that the deadly weapon element does not reflect an intent requirement indicating lesser culpability or a less serious risk of harm. *Rush*, 50 S.W.3d at 431. The same logic also dictates that felony reckless endangerment is not a lesser included offense of attempted first degree murder because the greater charge does not require proof of the use of a deadly weapon. Thus, the trial court should not have instructed the jury that felony reckless endangerment was a lesser included offense of attempted first degree murder.

Appellant concedes in his brief that counsel failed to object to the jury instruction at trial, and asserts that counsel did not request the instruction at trial. T.C.A. § 40-18-110(d) states:

> Prior to instructing the jury on the law, the trial judge shall give the parties an opportunity to object to the proposed lesser included offense instructions. If the defendant *fails to object to a lesser included offense instruction, the inclusion of that lesser included offense instruction may not be presented as a ground for relief either in a motion for a new trial or on appeal*. Where the defendant objects to an instruction on a lesser included offense and the judge does not instruct the jury on that offense, the objection shall constitute a waiver of any objection in the motion for a new trial or on appeal concerning the failure to instruct on that lesser included offense. The defendant's objection shall not prevent the district attorney general from requesting lesser included offense instructions or prevent the judge from instructing on lesser included offenses.

(emphasis added). Thus, failure to object to the instruction at trial ordinarily constitutes waiver of the issue on appeal. *Id. See also State v. Page*, 184 S.W.3d 223, 229-30 (Tenn. 2006) (determining that T.C.A. § 40-18-110(d) is constitutional).

Despite the waiver provisions of T.C.A. § 40-18-110(d), Appellant cites *State v. Davenport*, 980 S.W.2d 407, 409 (Tenn. Crim. App. 1998), to support his argument that counsel's acquiescence to the charge by silence cannot be perceived as consent to the charge when the charge is blatantly erroneous.

In *Davenport*, the defendant was indicted for attempted first degree murder, aggravated assault and two counts of reckless endangerment. *Id*. at 407. At the conclusion of the trial, the trial court instructed the jury on the elements of attempted first degree murder. Additionally, the trial court charged the jury on aggravated assault as a lesser included offense of attempted first degree murder. The defendant neither requested nor objected to the jury instruction on aggravated assault. The defendant was convicted of aggravated assault. The defendant's conviction was affirmed on appeal. *State v. Michael Davenport*, No. 03C01-9310-CR-00342, 1994 WL 706698 (Tenn. Crim. App., at Knoxville, Dec. 21, 1994). The defendant subsequently filed a writ of habeas corpus and/or petition for post-conviction relief, relying upon the Tennessee Supreme Court's decision in *State v. Trusty*, 919 S.W.2d 305 (Tenn. 1996). In *Trusty*, the court held that aggravated assault is neither a lesser included offense nor lesser grade of attempted first degree murder. *Id.* The trial court granted the petition for writ of habeas corpus in light of the *Trusty* decision. The State appealed, arguing that the defendant's failure to object to the instruction at trial constituted an implicit amendment to the indictment to include aggravated assault. This Court upheld the grant of the petition for writ of habeas corpus, noting that "where the defendant affirmatively requests a particular jury instruction on an offense not charged in the indictment, erroneously believing that offense to be a lesser included offense of the charged crime, the defendant is deemed to have consented to an amendment of the indictment . . . [h]owever, we will not presume consent merely from the accused's silence." *Davenport*, 980 S.W.2d at 409.

The State, on the other hand, cites *State v. Robert W. Bentley*, No. 02C01-9601-CR-00038, 1996 WL 594076 (Tenn. Crim. App., at Jackson, Oct. 17, 1996), to support its argument that the

Appellant has waived the issue on appeal by failing to object at trial. In *Robert W. Bentley*, this Court upheld the defendant's convictions for felony reckless endangerment, which arose from the jury being incorrectly instructed that felony reckless endangerment was a lesser included offense of attempted first degree murder. This Court concluded that because defense counsel *requested* a jury instruction on felony reckless endangerment as a lesser included offense of attempted first degree murder and both parties consented to the instruction, it constituted an amendment to the defendant's indictments. *Robert W. Bentley*, 1996 WL 594076, at *2 (emphasis added). Thus, the defendant's conviction was upheld.

Since this case was heard at oral argument, we note that the Tennessee Supreme Court has issued an opinion in *Demonbruen v. Bell*, 226 S.W.3d 321 (Tenn. 2007), dealing with a substantially similar issue in the context of a habeas corpus petition. In *Demonbreun*, the defendant was charged with attempted first degree murder, and the trial court charged the jury with aggravated assault as a lesser included offense. The defendant was convicted of aggravated assault as a lesser included offense of attempted first degree murder. In his habeas petition, the defendant argued that his conviction was void because the indictment failed to notify him of the charges against him, namely aggravated assault, because aggravated assault was not a lesser included offense of attempted first degree murder. It is clear from the record that the defendant's counsel requested the instruction for aggravated assault at trial. This Court granted habeas relief, determining that because aggravated assault was not a lesser included offense of attempted first degree murder at the time of the defendant's conviction, the defendant could not legally be convicted of an offense that was not charged in the indictment. *Wayford Demonbreun v. Ricky Bell*, No. M2005-01741-CCA-R3-HC, 2006 WL 197106 (Tenn. Crim. App., at Nashville, Jan. 26, 2006), *perm. app. granted* (Tenn. Aug. 21, 2006). Thus, the conviction for aggravated assault was void on its face because the trial court lacked the authority to render a judgment. *Id.* at *5. The Tennessee Supreme Court granted permission to appeal and determined, after examining *Davenport*, *Bentley* and several other cases that the court would:

> [C]ontinue to follow the rule set forth in *Davenport*, 980 S.W.2d at 409, and reaffirmed in *Stokes*, 24 S.W.3d at 306, that we will not presume consent to an amendment to an indictment merely from the defendant's silent acquiescence to a jury instruction based on an incorrect belief that an offense is a lesser included offense. However, we find nothing in *Stokes* to prevent the court from finding an effective amendment to an indictment where the defendant actively seeks the jury instruction on the uncharged offense. A defendant should not be able to "'complain about convictions on an offense which, without his own counsel's intervention, would not have been charged to the jury.'" *Ealey*, 959 S.W.2d at 612 (quoting *Bentley*, 1996 WL 594076, at *2). This is particularly true in light of Tennessee Rule of Appellate Procedure 36(a), which states in pertinent part: "Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."

Demonbreun v. Bell, 226 S.W.3d 321, 326 (Tenn. 2007). Thus, in *Demonbreun*, the court determined that because the defendant "actively sought" the instruction on aggravated assault, his actions constituted an effective amendment of the indictment. *Id.* Consequently, the trial court had jurisdiction to convict the defendant of aggravated assault. His conviction was not void. He was not entitled to habeas corpus relief. *Id.* at 326-27.

Taking the cases cited by both Appellant and the State, as well as *Demonbreun* and T.C.A. § 40-18-110(d) into account, we begin our analysis. Initially, we note that *Demonbreun*, *Davenport* and *Robert W. Bentley* all arose under the lesser included offense statute in effect before the amendment to T.C.A. § 40-18-110 that added subsection (d) which creates a waiver on appeal of any issue relating to a lesser included offense instruction actually given if no objection to the instruction is interposed by the defendant. Moreover, *Demonbreun* and *Robert W. Bentley* involve situations where the defendant affirmatively requested that a lesser included offense instruction be given thereby implicitly consenting to an amendment to the indictment to charge the lesser offense. Thus, these cases do not directly address the issue in the case at bar.

The only case that deals directly with T.C.A. § 40-18-110(d) is *State v. Christopher S. Love*, No. M2005-01731-CCA-R3-CD, 2006 WL 2843437 (Tenn. Crim. App. at Nashville, Oct. 5, 2006). In *Christopher S. Love*, the defendant, who was indicted for aggravated rape, contended that it was error for the trial court to instruct the jury on the lesser included offense of sexual battery. The defendant argued that there was no evidentiary basis for the instruction since the defense was that consensual sex had occurred thereby making the only question at trial whether there was a rape. However, the defendant had not objected when the instruction on sexual battery was proposed by the trial court. This Court relying on T.C.A. § 40-18-110(d) found that the defendant had waived appellate review of the issue through his failure to object to the sexual battery instruction. *Christopher S. Love*, 2006 WL 2843437, at *3.

Of course, *Christopher S. Love* is distinguishable from the instant case in that sexual battery is a lesser included offense of aggravated rape. Thus, an indictment for aggravated rape also embraces sexual battery. The situation presented in the case sub judice appears to be one of first impression, i.e., whether a criminal defendant's failure to object to a proposed lesser included offense instruction when the proposed lesser offense is not a lesser included offense of the principal charge constitutes consent to an amendment to the indictment. We hold that it does not and endeavor to explain.

An accused in a criminal case has the right to be tried only upon a presentment or indictment returned by a grand jury.[2] Tenn. Const. art. I, § 14. Thus, if there is to be no violation of this provision, T.C.A. § 40-18-110(d) must be interpreted as not only providing for a waiver of appellate review when no objection is raised to a proposed lesser included offense instruction, but also as providing for an implicit consent to an amendment to the indictment when the proposed lesser offense is not embraced as a lesser included offense in the principle charge. Such an interpretation however runs afoul of well-established constitutional requirements that a criminal defendant receive fair and reasonable notice prior to trial of the offense for which he is charged. U.S. Const. amend. VI; Tenn. Const. art. 1, §9; *Hagner v. United States*, 285 U.S. 427, 431 (1932); *State v. Cleveland*, 959 S.W.2d 548, 552 (Tenn. 1997); *Warden v. State*, 381 S.W.2d 244, 245 (Tenn. 1964). Without a valid indictment there can be no valid prosecution, and a conviction upon an unindicted offense is a clear violation of due process of law under both the federal and state constitutions. *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937); *State v. Trusty*, 919 S.W.2d 305, 309 (Tenn. 1996), *overruled on other grounds by State v. Dominy*, 6 S.W.3d 472, 476-77 (Tenn. 1999) (stating a conviction obtained in violation of the reasonable notice provisions required by article I, section 9 of the Tennessee Constitution violates due process under Tennessee Constitution article I, section 8); *State v. Morgan*, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979).

Therefore, an interpretation of T.C.A. § 40-18-110(d) that allows mere silence at the end of a trial to constitute consent to amend the indictment to add a charge not already embraced by the principal charge, is an interpretation that seriously calls into question the constitutionality of T.C.A. § 40-18-110(d), at lease with respect to this application of the statute.

Moreover, Tennessee Rule of Criminal Procedure 7(b)(1) provides: an indictment, presentment or information may be amended in all cases with the consent of the defendant. If no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches. Tenn. R. Crim. P. 7(b)(2).

Unless the amendment provisions of Tenn. R. Crim. P. 7(b) are met, after an indictment has been returned, its charge may not be broadened or changed except by action of the grand jury. *See* U.S. Const. amend. V; Tenn. Const. art. I, § 14; *United States v. Miller*, 471 U.S. 130, 145, 105 S. Ct. 1811, 1820 (1985); *Stirone v. United States*, 361 U.S. 212, 215-16, (1960). "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment." *Stirone*, 361 U.S. at 218-19.

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[2] In addition to the prosecution of criminal offenses by way of indictment or presentment of a grand jury offense, prosecution may also commence by the filing of an information. T.C.A. § 40-3-103. To prosecute upon an information requires the consent of the accused, the accused's attorney, and the court. T.C.A. § 40-3-103(a). It is the mandatory duty of the court to advise the accused of his or her constitutional right to be tried only upon presentment or indictment of the grand jury, and the accused must agree in writing to the waiver of this right. T.C.A. § 40-3-103(c)(1), (2). These procedures underscore the fundamental importance that waiver of a defendant's right to be tried only by indictment or presentment of a grand jury is personal to the defendant, may not be assumed from a silent record, and must be knowingly and intelligently made.

In *State v. Stokes*, 24 S.W.3d 303, 306-07 (Tenn. 2000), our supreme court concluded that, to comply with Rule 7(b), consent of the defendant must be clear from the record.

This principle was reaffirmed in *Demonbreun* and *Michael Davenport*. In *Demonbreun* our supreme court stated, "we will not presume consent to an amendment to an indictment merely from the defendant's silent acquiescence to a jury instruction based on an incorrect belief that an offense is a lesser included offense." *See Demonbreun*, 226 S.W.3d at 326. Although those cases arose under the predecessor to T.C.A. § 40-18-110(d), this rule of law is also more congruent than that urged by the State, with the constitutional doctrine that;

> There is a presumption against the waiver of constitutional rights, *see e.g. Glasser v. United States*, 315 U.S. 60, 71-72, 624 S.Ct. 457, 86 L.Ed. 680, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'

Brookhart v. Janis, 384 U. S. 1, 4 (1966) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)).

Finally, where a statute is susceptible to two interpretations, one in harmony with, and the other in violation of, constitutional provisions, it is the duty of the courts to interpret the statute so as to bring it within constitutional limitation. *Ellenburg v. State*, 384 S.W.2d 29, 31 (Tenn. 1964) (citing *Exum v. Griffis Newbern Co.*, 230 S.W. 601, 603 (Tenn. 1921)). Bearing this tenet in mind, we hold that T.C.A. § 40-18-110(d) provides for a waiver of a defendant's right to challenge only a *lesser included* offense instruction, since a truly lesser included offense is already embraced in the principal charge. This was the case in *Christopher S. Love*. The statute however does not create a waiver through a mere failure of a defendant to object and by implication an amendment to the indictment to allege any offense the trial court cares to inject into the prosecution.

In summary, we hold that T.C.A. § 40-18-110(d) does not provide for a waiver of appellate review where a defendant fails to object to an offense that is not a *lesser included* offense of the principal charge already in the indictment. A fortiori a defendant's mere failure to object to a proposed jury instruction which includes an offense that is not a lesser included offense, will likewise not constitute implicit consent to an amendment to the indictment.

Sentencing

Lastly, Appellant complains that his sentences are excessive and that the trial court erred by ordering them to be served consecutively. Specifically, as to the length of his sentences, Appellant

argues that the trial court improperly applied enhancement factors to his convictions.[3] The State disagrees, arguing that the trial court correctly sentenced Appellant. Because we have vacated Appellant's conviction for felony reckless endangerment, we will not address any issues concerning the propriety of the sentence for that offense. Because only one conviction remains in effect given the Court's holding herein, we likewise decline to address consecutive sentencing.

Recently, in response to *Cunningham v. California*, 549 U.S. ___, 127 S. Ct. 856 (2007), the Tennessee Supreme Court issued an opinion on remand from the United States Supreme Court in *State v. Gomez*, No. M2002-01209-SC-R11-CD, ___ S.W.3d ___, 2007 WL 2917726 (Tenn. Oct. 9, 2007) ("*Gomez II*"), that affects our review of the application of enhancement factors to a defendant's sentence. On initial review of the issues on *State v. Gomez*, 163 S.W.3d 632, 650 (Tenn. 2005) ("*Gomez I*"), the court concluded that the defendants were limited to plain error review of their sentencing claims regarding the Sixth Amendment due to their failure to preserve the issues for plenary review. In *Gomez II*, the court determined that in light of the *Cunningham* decision, a trial court's enhancement of a defendant's sentence on the basis of judicially determined facts other than the defendant's prior convictions violates the defendant's constitutional rights under the Sixth Amendment to the United States Constitution. *Gomez*, ___ S.W.3d ___, 2007 WL 2917726, at *6.

We note that Appellant herein failed at the trial level to raise any Sixth Amendment issue akin to the issue raised in *Blakely v. Washington*, 540 U.S. 1174 (2004), or its progeny. Thus, like the defendants in *Gomez II*, Appellant may obtain relief on this issue, if at all by way of plain error relief under Tennessee Rule of Criminal Procedure 52(b).

In order to determine whether plain error review under Tennessee Rule of Criminal Procedure 52(b) is appropriate, five factors must all be established. These five factors are as follows: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the defendant must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000) (citing *State v. Adkisson*, 899 S.W.2d 626, 641 (Tenn. Crim. App. 1994)). "It is the accused's burden to persuade an appellate court that the trial court committed plain error." *State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2004) (citing *U.S. v. Olano*, 507 U.S. 725, 734 (1993)).

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[3] Effective June 7, 2005, the Tennessee General Assembly, in response to the United States Supreme Court case of *Blakely v. Washington*, 542 U.S. 296 (2004), amended Tennessee Code Annotated sections 40-35-102, -210, and -401 to reflect the advisory nature of enhancement factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. The amendment, among other things, removed the presumptive sentence language from our Sentencing Act and mandated only that the trial "court shall impose a sentence within the range of punishment. . . ." *Compare* T.C.A. § 40-35-210(c) (Supp. 2005); *with* T.C.A. § 40-35-210(c) (2003). The legislature also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. *Id.* Appellant herein committed the offenses on March 1, 2003, and was sentenced on December 9, 2005. There is no waiver executed by Appellant in the record herein. Thus, the amendments to the Sentencing Act do not apply to Appellant.

However, we determine that consideration of the trial court's actions, in this case, is not necessary to do substantial justice and, consequently, no plain error was committed on the part of the trial court. The trial court relied on the following enhancement factor to enhance Appellant's convictions: "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." T.C.A. § 40-35-114(1). A trial court can "properly consider without jury findings a defendant's prior convictions, as well as prior criminal behavior admitted to by a defendant, when imposing sentence." *Gomez*, ___ S.W.3d ___, 2007 WL 2917726, at *7 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000)). The pre-sentencing report in the case herein indicated that Appellant had at least thirteen prior criminal convictions including, inter alia, assault, possession of cocaine, evading arrest, joyriding, theft of property and criminal impersonation. The prior criminal convictions included several felonies and all of the convictions were received in a short five-year period of time. As a result of the extensive nature of Appellant's prior criminal convictions, we conclude that the application of this enhancement factor alone justifies the trial court's decision to enhance Appellant's sentence to the mid-range of ten years for aggravated robbery.[4]

CONCLUSION

Because felony reckless endangerment is not a lesser included offense of attempted first degree murder, Appellant's failure to object does not constitute consent to amend the indictment to add reckless endangerment, and Appellant is not precluded from appellate review of this issue. Therefore, Appellant's conviction for reckless endangerment is vacated and this case is remanded to the Davidson County Criminal Court for such other proceedings as may be necessary. Appellant's conviction and sentence for aggravated robbery is affirmed.

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JERRY L. SMITH, JUDGE

[4] The sentencing range for a Range I offender convicted of a Class B felony, such as aggravated robbery, is not less than eight nor more than twelve years. *See*, T.C.A. § 40-35-112(a)(2).